Supreme Court, U.S.
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No. 92-162

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

INTERNATIONAL INSURANCE COMPANY,
Petitioner,

v.

BRIDGESTONE/FIRESTONE, INC., FMC CORPORATION, MONSANTO COMPANY, REICHHOLD LIMITED, STAUFFER CHEMICAL COMPANY (now known as RHONE-POULENC BASIC CHEMICALS COMPANY),

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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198

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. Whether the Ninth Circuit's determination that a non-party seeking modification of a protective order after final judgment in order to obtain access to discovery materials may proceed by filing a motion to intervene pursuant to Federal Rule of Civil Procedure 24(b), in accord with the uniform decisions of the other circuits that have considered that issue, was an improper extension of federal jurisdiction?

LIST OF PARTIES

The Respondents involved in this appeal are Monsanto Company,[1] Reichhold Limited,[2] FMC Corporation,[3] Bridgestone/Firestone, Inc.[4], and Stauffer Chemical Company (now known as Rhone-Poulenc Basic Chemicals Company).[5]

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[1] Monsanto Company has no publicly-owned parent. Non-wholly-owned subsidiaries of Monsanto Company are: Southwall Technologies, Inc.; LTX; and Cadence Designs Systems, Inc. Further, Monsanto's wholly-owned subsidiary, Inno Ven II Corporation, holds less than a 5% common stock interest in each of the following publicly-owned companies: Dynamic Sciences International; Micro General Corporation; Xylogics Inc.; WEITEK Corporation; Hasbro, Inc.; MacNeil Schindler, Inc.; Gensia, Inc.; and GeneLabs Technology, Inc.

[2] The parent and related companies of Reichhold Limited are, respectively: Reichhold Chemicals, Inc. (parent); DIC Americas, Inc. (parent of Reichhold Chemicals, Inc.); Dionippon Ink & Chemicals, Inc. (parent of DIC Americas, Inc.) (trading on Tokyo, Osaka, Wagoya Stock Exchange).

[3] The following are non-wholly-owned subsidiaries or affiliates of FMC Corporation: FMC Gold Company (non-wholly-owned subsidiary); Ciniflex Teknowledge Corp. (affiliate). FMC Corporation also has a number of subsidiaries and affiliates located in foreign countries, a list of which will be furnished if the Court deems it necessary.

[4] The parent and non-wholly-owned subsidiaries of Bridgestone/Firestone, Inc. are, respectively: Bridgestone Corporation (parent); Firestone Stores of Bay City, Inc.; Brea, Inc.; El Toro, Inc.; Fullerton-Placentia Ave., Inc.; South Coast Plaza, Inc.; Sunnymeade, Inc.; Colorado Springs, Inc.; Englewood, Inc.; Lakewood, Inc.; Littleton, Inc.; Rustic Hill, Inc.; Villa Italia, Inc.; Orlando-Curry, Inc.; Chicago-Ford, Inc.; Riverdale, M.D., Inc.; Roseville, M.N., Inc.; Jennings, Inc.; Delta Holding, Inc. (non-wholly-owned subsidiaries). Bridgestone/Firestone, Inc. has a number of subsidiaries and affiliates located in foreign countries, a list of which will be furnished if the Court deems it necessary.

[5] The parent and non-wholly-owned subsidiaries of Rhone-Poulenc Basic Chemicals Company are, respectively: Rhone-Poulenc, Inc. (parent); Rhone-Poulenc of Wyoming Company; Rhone-Poulenc of Wyoming L.P.; Overland Trail Transmission Company L.P. (non-wholly-owned subsidiaries).

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS CONCERNING THE USE OF RULE 24(b) TO PERMIT LIMITED INTERVENTION FOR THE SOLE PURPOSE OF MODIFYING A DISOVERY PROTECTIVE ORDER AND WITHOUT FILING A PLEADING OR ASSERTING AN INDEPENDENT BASIS FOR FEDERAL JURISDICTION	4
A. The Ninth Circuit's Decision Does Not Conflict With Any Decisions of This Court	5
B. The Ninth Circuit's Application of Rule 24(b) Is Consistent with the Overriding Goal of the Federal Rules of Civil Procedure	7
1. The Ninth Circuit Correctly Determined That No Purpose Would Be Served by Requiring a Pleading When Intervention Is Sought for the Limited Purpose of Seeking Modification of a Protective Order	8
2. The Ninth Circuit Correctly Determined That No Independent Basis for Federal Jurisdiction Need Be Asserted Where an Intervenor Does Not Seek To Litigate a Claim or Defense on the Merits	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

In re Agent Orange Product Liability Litigation, 821 F.2d 139 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987) 11
In re Beef Industry Antitrust Lit., 589 F.2d 786 (5th Cir. 1979) 9
Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., —— U.S. ——, 111 S. Ct. 922 (1991) 6-7
Commissioner v. Brown, 380 U.S. 563 (1965) 6
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S. Ct. 2447 (1990) 7
Cunningham v. Rolfe, 131 F.R.D. 587 (D. Kan. 1990) 10
Diamond v. Charles, 476 U.S. 54 (1986) 9-10
Foman v. Davis, 371 U.S. 178 (1962) 6
Kamerman v. Steinberg, 681 F. Supp. 206 (S.D.N.Y. 1988) 10
Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979) 9
Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc., 823 F.2d 159 (6th Cir. 1987) 9
Miami County Nat'l Bank of Paola, Kan. v. Bancroft, 121 F.2d 921 (10th Cir. 1941) 8
New York News v. Newspaper & Mail Deliverers' Union, 139 F.R.D. 291 (S.D.N.Y. 1991) 10
Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) 7
Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) 9, 11
Spring Constr. Co., Inc. v. Harris, 614 F.2d 374 (4th Cir. 1980) 8
United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 799 (1991) 5, 10, 11
WJA Realty Ltd. Partnership v. Nelson, 708 F. Supp. 1268 (S.D. Fla. 1989) 8
Wilk v. American Medical Association, 635 F.2d 1295 (7th Cir. 1981) 9

TABLE OF AUTHORITIES—Continued

RULES — Page

Federal Rules of Civil Procedure
Rule 1 ..... 5, 6
Rule 11 7
Rule 24 ..... *passim*

MISCELLANEOUS

3B Moore's Federal Practice, § 24.14 (2d Ed. 1990) 8

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The Petitioner seeks review of a decision of the United States Court of Appeals for the Ninth Circuit which affirmed two orders of the United States District Court of the Central District of California (Pfaelzer, J.), that granted the Respondents' motions for leave (1) to intervene, and (2) to modify a protective order to grant Respondents access to six deposition transcripts and their exhibits. The action before the district court (the "*Beckman*" action) involved the issue of whether environmental impairment liability ("EIL") insurance policies sold by International Insurance Company ("Interna-

tional") to Beckman Instruments, Inc. ("Beckman") provided coverage to Beckman for certain environmental liabilities.

On June 23, 1986, the district court entered a "Stipulated Discovery Management and Protective Order" (the "Protective Order") which, among other things, provided that the discovery in the action would be kept confidential. The discovery taken in the action included depositions of six individuals responsible for the development, sale, and claims handling of the standard-form EIL insurance policies sold by International to policyholders throughout the United States, including the Respondents. The *Beckman* action was dismissed by stipulation, pursuant to a settlement, in May 1988.

Each of the Respondents now has pending litigation against International concerning the scope of coverage provided by one or more EIL policies sold to it by International.[6] Each of the Respondents' coverage actions raises the same issues presented in this case concerning the meaning of the standard-form policy language contained in EIL insurance policies sold by International.

On April 25, 1990, the Respondents moved to intervene in this action for the sole purpose of seeking modification of the Protective Order, to enable them to obtain the six EIL deposition transcripts, including exhibits. The Respondents believe that those transcripts will provide highly relevant information relating to either Interna-

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[6] The Respondents' actions are: *Montrose Chemical Co. v. Canadian Universal Co., Inc.* (Case No. C 594 148) (consolidated with *Stauffer Chemical Co. v. American Motorists Ins. Co.*, No. C 597 389 (Super. Ct., Los Angeles Cty., Cal.); *Monsanto Co. v. Aetna Casualty and Surety Co.*, No. 88L-JA-118 (Super. Ct., New Castle Cty., Del.); *Bridgestone/Firestone, Inc. v. AIU Insurance Co.*, 89 01-0158 (Ct. of Common Pleas, Summit Cty., Oh.); *FMC Corp. v. Liberty Mut. Ins. Co.*, No. 643058 (Super. Ct., Santa Clara Cty., Cal.); *Reichhold Ltd. v. International Insurance Co.*, No. R.E. 1492/87 (Sup. Ct., Ontario, Canada).

tional's or its agents' drafting, interpretation, underwriting, and administration of the standard-form EIL insurance policies. Additionally, the transcripts may provide admissions against interest and statements that are inconsistent with statements made or positions taken by International in the Respondents' coverage actions.[7]

On June 29, 1990, after briefing and a hearing, the district court granted the Respondents' motions to intervene and to modify the Protective Order. The district cour found ample and consistent precedent for permitting limited intervention to seek relief from a protective order so that discovery may be used in a similar action. The district court found that: (a) the Respondents' motions were timely; (b) there were no extraordinary circumstances militating against intervention; and (c) "the importance of access to documents prepared for similar litigation involving the same party militates for intervention." (Appendices B and C, at B-2, C-2.)

International appealed the district court's orders to the United States Court of Appeals for the Ninth Circuit, and sought a stay of the orders pending appeal. The Ninth Circuit denied International's motion for a stay and, in a decision dated June 4, 1992, affirmed the orders of the district court. (Appendix A.)

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[7] After the district court granted their motions to intervene and to modify the Protective Order, some of the Respondents obtained certain of the EIL deposition transcripts. They have not been able to locate all of the transcripts, however, nor have they obtained any of the deposition exhibits.

REASONS FOR DENYING THE WRIT

As Petitioner has acknowledged, the Ninth Circuit's decision is consistent with the decisions of all other circuit courts that have considered whether intervention should be permitted for the limited purpose of seeking modification of a protective order governing discovery, and without filing a pleading or asserting an independent basis for federal jurisdiction. Thus, the Ninth Circuit's decision does not raise any conflict between the circuits, and the petition should be denied.

Further, Petitioner errs when it asserts that the Ninth Circuit's decision conflicts with the decisions of this Court that have construed a rule or statute consistent with its plain meaning. No decision of this Court has required strict adherence to a technical requirement of a Federal Rule of Civil Procedure in circumstances where such adherence would increase, rather than decrease, the burden of litigation on the affected parties and thus be contrary to the overriding goal of the Rules, set forth in Rule 1, "to secure the just, speedy, and inexpensive determination of every action." Therefore, there is no cause for this Court to exercise its certiorari jurisdiction, and the Petition should be denied.

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS CONCERNING THE USE OF RULE 24(b) TO PERMIT LIMITED INTERVENTION FOR THE SOLE PURPOSE OF MODIFYING A DISCOVERY PROTECTIVE ORDER AND WITHOUT FILING A PLEADING OR ASSERTING AN INDEPENDENT BASIS FOR FEDERAL JURISDICTION

Petitioner concedes (Petition at 5) that there is no conflict among the Circuit Courts of Appeals that Rule 24(b) allows intervention for the limited purpose of seeking relief from a discovery protective order. Thus, the Ninth Circuit's decision is consistent with a line of

decisions from the Circuit Courts of Appeals that, consistent with Fed. R. Civ. P. 1, have construed Rule 24(b) to "secure the just, speedy, and inexpensive determination of every action," by allowing a litigant to gain access to relevant discovery material that may significantly reduce the expense of its own action and aid in the resolution of that action. (Appendix A at A-4, citing decisions from the First, Second, Fifth, Sixth and Tenth United States Circuit Courts of Appeals.)

This Court previously has declined to review all of the Circuit Court decisions addressing this issue in which certiorari was sought. *Id.* Indeed, just last year, this Court denied a request by the Petitioner in this case to review a Tenth Circuit decision that reached the same result, in virtually identical circumstances, as the Ninth Circuit reached below. *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 799 (1991) ("*United Nuclear*").

A. The Ninth Circuit's Decision Does Not Conflict with Any Decisions of This Court

Petitioner's sole argument is that the "plain meaning" of Rule 24(b) supposedly does not permit intervention for the limited purpose of seeking modification of a protective order. Petitioner contends that a literal adherence to Rule 24(b) permits intervention only where a party seeks to litigate a "claim or defense" within the action, and has filed a pleading setting forth that claim or defense.[8] Petitioner thus asserts that the Ninth Circuit's decision, and the consistent decisions of the other Circuit Courts that the Ninth Circuit followed, purport-

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[8] Fed. R. Civ. P. 24(b) allows a person to intervene when his "claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(c) states that a motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

edly conflict with this Court's decisions applying the "plain meaning" rule. (Petition at 6-9.)

Petitioner's argument, itself, however, fails to recognize the plain meaning of Rule 1. That rule states that all of the Federal Rules of Civil Procedure, including Rule 24(b), "shall be construed to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. This Court has relied on Rule 1 in rejecting an overly technical construction of the Rules. *See, e.g., Foman v. Davis*, 371 U.S. 178, 181-82 (1962) ("*Foman*"). In *Foman*, this Court held that "it is contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities . . . . The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1." *Id.*

The Ninth Circuit's construction of Rule 24(b), to permit limited intervention for purposes of modifying a discovery protective order, accords with the mandate of Rule 1. Further, the Ninth Circuit's decision is not inconsistent with this Court's decisions applying the plain meaning of a rule or statute. Those decisions do not require strict adherence to a technical requirement in circumstances, such as those here, where requiring strict adherence would make no sense. Indeed, this Court has held, consistent with common sense, that

> the courts, in interpreting a statute, have some "scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute."

Commissioner v. Brown, 380 U.S. 563, 571 (1965), quoting *Helvering v. Hamnel*, 311 U.S. 504, 510-11, 61 S. Ct. 368 (1941). Even in one of the cases cited by Petitioner, *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, —— U.S. ——, 111 S. Ct. 922, 928, 930

(1991) (Petition at 6), where this Court cited the "plain meaning" rule in construing Rule 11, the Court also supported its decision by reference to common sense.[9]

Further, in *Cooter & Gell*, *supra*, the Court upheld the authority of the district courts to consider collateral issues related to their jurisdiction over an action, even after the action has been resolved. 110 S. Ct. at 2455. A motion for limited intervention for purposes of seeking relief from a protective order is simply another example of such a collateral issue related to a district court's continuing jurisdiction, which the district court should be permitted to resolve.

B. The Ninth Circuit's Application of Rule 24(b) Is Consistent with the Overriding Goal of the Federal Rules of Civil Procedure

In accord with the plain meaning of Rule 1, Rule 24 should be construed with reference to its underlying purpose of streamlining litigation. In circumstances where limited intervention is sought only to modify an existing order, as to which the district court has continuing jurisdiction, no purpose would be served by requiring a pleading asserting an intervenor's independent claim against any party. Further, because no independent claim is being made, there is no need to assert an independent basis for federal jurisdiction.

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[9] Two of the other "plain meaning" decisions cited by Petitioner also address enforcement of Rule 11. This Court has strictly enforced Rule 11 because the rule was designed to curb litigation abuse and ensure the just, speedy, and inexpensive determination of every action. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 2454 (1990) ("*Cooter & Gell*"). In *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989), the Court held that Rule 11 does not permit the award of sanctions against a law firm, but only against an individual attorney who signed a pleading.

1. *The Ninth Circuit Correctly Determined That No Purpose Would Be Served by Requiring a Pleading When Intervention Is Sought for the Limited Purpose of Seeking Modification of a Protective Order*

The purpose of Rule 24(c)'s requirement that an intervenor file a pleading is to enable the court to determine whether the district court has jurisdiction over the matter as to which permissive intervention is sought. *E.g.*, *Miami County Nat'l Bank of Paola, Kan. v. Bancroft*, 121 F.2d 921, 926 (10th Cir. 1941). A further purpose is to place the other parties on notice of the relief sought by the intervenor and the grounds asserted for relief. *Spring Constr. Co., Inc. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980) ("*Spring Construction*"); *WJA Realty Ltd. Partnership v. Nelson*, 708 F. Supp. 1268, 1272 (S.D. Fla. 1989) ("*WJA Realty*"). Respondents' motion papers clearly indicated not only the factual basis for their motions to intervene and their interest in the action, but also the limited scope of their requested relief. Thus, their motion papers satisfied the purpose of the Fed. R. Civ. P. 24(c) pleading provision.

Judicial interpretation of the Rule 24(c) pleading requirement has been liberal. As the Ninth Circuit stated, "[c]ourts, including this one, have approved intervention motions without a pleading where the Court was otherwise apprised of the grounds for the motion." (Appendix A at A-7). The court further stated that it previously had "rejected the type of technical objection International makes here." *Id.*, citing *Shores v. Hendy Realization*, 133 F.2d 738, 742 (9th Cir. 1943); *Smith v. Pangilinan*, 651 F.2d 1320, 1325-26 (9th Cir. 1981). Accord *Spring Construction*, 614 F.2d at 377 (proper approach is to disregard non-prejudicial defects); *WJA Realty*, 708 F. Supp. at 1272. *See generally* 3B Moore's Federal Practice, 24.14 (2d ed. 1990).

Further, the other Circuit Courts that have addressed limited intervention for obtaining discovery also have not

required rigid adherence to the Rule 24(c) pleading requirement or have dispensed with it as a mere technicality that has no meaning in that context. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 784 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 293 (2d Cir. 1979); *In re Beef Industry Antitrust Lit.*, 589 F.2d 786, 789 (5th Cir. 1979).

Petitioner is wrong to suggest that courts granting intervention to modify a protective order have done so without consideration of the purpose behind the Federal Rules. (Petition at 9-11). In *Wilk v. American Medical Association*, 635 F.2d 1295, 1299 (7th Cir. 1981), for example, the court held that:

> Rule 1 of the Federal Rules requires the Rules to be construed "to secure the just, speedy, and inexpensive determination of every action". We therefore agree with the result reached by every other appellate court which has considered the issue, and hold that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.

See also Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc., 823 F.2d 159, 164 (6th Cir. 1987).

Petitioner further errs in relying on Justice O'Connor's separate opinion in *Diamond v. Charles*, 476 U.S. 54, 75-76 (1986) (O'Connor, J., concurring in part and concurring in the judgment). That case addressed a private physician's attempt to become an active party to the litigation, by intervening to defend the validity of a state abortion statute—not a non-party seeking intervention in order to gain access to pretrial discovery materials for use in a similar action. Even there, however, Justice O'Connor acknowledged that "permissive intervention

'plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation . . . .' " *Id.* at 77 (citation omitted).

Petitioner also relies on three district court decisions that did not allow intervention under Rule 24(b). In *New York News v. Newspaper & Mail Deliverers' Union*, 139 F.R.D. 291, 292, 293 (S.D.N.Y. 1991), however, the court denied a motion for limited permissive intervention under Rule 24(b), because it "would cause delay and prejudice the parties." The court explicitly stated that the failure to file a pleading as required by Rule 24(c) was not sufficient to defeat a motion to intervene. *Id.* at 293. Further, the court acknowledged that the proposed intervenor's claim had a question of fact in common with the action before the court. *Id.*

In *Kamerman v. Steinberg*, 681 F. Supp. 206, 211, 212 (S.D.N.Y. 1988) ("*Kamerman*"), the court held that the would be intervenor's purpose—to delay the federal court action—was sufficient reason to deny leave to intervene under Rule 24(b). Thus *Kamerman* does not indicate that limited intervention is impermissible under Rule 24.

Finally, in *Cunningham v. Rolfe*, 131 F.R.D. 587, 590 (D. Kan. 1990), although the court found that a motion to intervene solely to modify a protective order governing discovery was not "contemplated by the rule allowing permissive intervention," it did not discuss the numerous Circuit Court decisions permitting intervention. Further, the court justified its denial with a host of other reasons, including the untimeliness of the motion and prejudice to the parties. *Id.* at 590-91.[10]

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[10] To the extent the *Cunningham* court's decision is based upon an interpretation of Rule 24, rather than on the court's discretion, it is inconsistent with the controlling precedent in its Circuit, *United Nuclear*, 905 F.2d 1424.

2. *The Ninth Circuit Correctly Determined That No Independent Basis for Federal Jurisdiction Need Be Asserted Where an Intervenor Does Not Seek To Litigate a Claim or Defense on the Merits*

Petitioner asserts that the Ninth Circuit's decision allowing Respondents to intervene without asserting an independent basis of federal jurisdiction, even though they did not seek to litigate a claim on the merits, conflicts with various decisions from other Circuits. No such conflict exists. In all of the Circuit Court cases relied on by Petitioner (Petition at 12-13), the intervenor sought to become involved in the merits of the underlying litigation, as opposed to seeking access to discovery.

The Ninth Circuit concluded that "an independent jurisdictional basis is not required because intervenors do not seek to litigate a claim on the merits. The district court retained the power to modify the protective order." (Appendix A at A-5). The court further stated that the Respondents "ask the court only to exercise that power which it already has, *i.e.*, the power to modify the protective order. For that reason, no independent jurisdictional basis is needed." *Id.* The court cited the following other Circuit Court decisions addressing a motion to intervene to seek modification of a protective order, for support: *United Nuclear*, 905 F.2d at 1427; *Public Citizen*, 858 F.2d at 782-83; *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 145 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987). None of those decisions required the intervenor to establish an independent basis for federal jurisdiction before it could seek modification of a protective order.

Given the absence of any conflict among the Circuit Courts, and the harmony between the decision below and the purposes of Rule 24, construed in accordance with Rule 1, this Court should deny the Petition.

CONCLUSION

In this case, the district court correctly determined that permissive intervention pursuant to Fed. R. Civ. P. 24(b) is the proper method by which a non-party may seek modification of a protective order. The Ninth Circuit's affirmance of that decision accords with decisions of the other Circuit Courts that have addressed the issue, and is not in conflict with any decisions of this Court. Therefore, the Court should deny the Petition.

Respectfully submitted,

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